STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF HEATHER B. MASON,	)	Case No. 2156-2005
Claimant,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**
vs.	)	
ZACHARY DUGDALE BZB ENTERPRISES d/b/a WENDY'S	)	
Respondent.	)	

* * * * * * * * * *

I. INTRODUCTION

Heather Mason filed a claim for unpaid overtime wages with the Wage and Hour Unit on April 25, 2005. The determination by the Wage and Hour Unit found that the respondent owed overtime wages to Mason in the amount of $2,452.00. The respondent appealed, maintaining that Mason was an exempt employee.

The Hearing Officer conducted a telephone hearing in this matter on August 25, 2005. Mason was present. Thomas Brothers, former general manager, appeared as a witness in her behalf. Zachary Dugdale, owner and president, represented the respondent.

Exhibits 1 through 55, were admitted into the record without objection. Exhibits 1 through 13, offered by Mason, were admitted into the record without objection.

II. ISSUE

The issue in this matter is to determine whether Zachary Dugdale, BZB Enterprises, d/b/a Wendy's owes overtime wages to Heather B. Mason and whether liquidated damages are owed.

III. FINDINGS OF FACT

1. Wendy's employed Mason as a crew member from August of 1999 to July of 2000 and as a shift supervisor from August 6, 2004 to February 20, 2005.

2. Prior to October 4, 2004, Dugdale paid Mason $6.76 per hour. She often worked more than 40 hours per week and Dugdale paid her premium pay for the overtime she worked.

3. On October 4, 2004, Dugdale changed Mason's pay to a salary. He agreed to pay her $17,000.00 per year, or $326.05 per week and advised her that she would be expected to work at least 50 hours per week. He did not require that she clock in or out any longer. Mason agreed to work hours as needed. At that time, she was regularly working approximately 50 hours per week.

4. The employer agrees that Mason was expected to work 50 hours per week as a shift supervisor. Mason worked as a shift supervisor between August of 2004 and February of 2005, or 26 weeks. However, she is requesting overtime pay for the 20 week period beginning October 4, 2004 and ending February 20, 2005, on the basis that she was paid overtime wages prior to October 4, 2004.

5. The employer has no record of Mason's hours but admits that she was expected to work 50 hours per week, maintaining that he sent her home often and that her car was not at the restaurant that often. He maintains that she is not entitled to overtime pay because she was a salaried manager, exempt from overtime.

6. Mason's premium rate for overtime is based upon 1.5 times her hourly wage which is calculated by dividing $326.05 by 40 hours, or $8.15 per hour. 1.5 times that amount yields a premium pay rate of $12.23 per hour. Her premium rate of $12.23 per hour for 10 hours per week for 20 weeks equals $2,446.00.

IV. DISCUSSION AND ANALYSIS[1]

A. Mason's claim for overtime wages.

Both Montana law and the Fair Labor Standards Act (FLSA) prohibit employers from employing their employees in excess of 40 hours in a single work

[1]Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

week unless the employee is paid not less than one and one-half times the employee's regular wage rate. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Both laws exempt certain employees from the requirement for overtime premium pay. Mont. Code Ann. § 39-3-406(1)(j) and 29 U.S.C. § 213(a)(1) and (17). Montana law allows employees owed wages, including wages covered under the FLSA, to pursue a claim with the Department of Labor and Industry to recover the wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Mason contends that Wendy's owes her overtime premium pay for 494 hours worked in excess of 40 per week. Dugdale contends that Mason has failed to prove she worked the hours and that she is an exempt employee.

B. Exempt employee status.

The question of whether Mason was an exempt employee not entitled to overtime premium pay is the key question in this case. It is a difficult one, due to the differences between state and federal law and the question of which law governs. If she is not exempt under the FLSA, then the remedies available under the FLSA govern her claim. Mont. Code Ann. § 39-3-408. If she is exempt under the FLSA, further analysis is necessary to determine if she is exempt under Montana law. *Babinecz v. Montana Highway Patrol*, 2003 MT, 315 Mont. 325, 68 P.3d 715. Thus, her claim must first be analyzed under the FLSA.

The initial step in the FLSA analysis is to determine whether Mason's employment was covered by the FLSA. The overtime provisions of the FLSA apply to enterprises engaged in commerce or the production of goods for commerce with a gross sales volume of $500,000.00 or more. 29 U.S.C. § 203(s)(1)(A). The same provisions also apply to employers with individual employees engaged in commerce. 29 U.S.C. § 201(a)(1). There is no evidence that the employer had a gross annual sales volume of $500,000.00, although it probably did. There is no doubt that it is an enterprise engaged in interstate commerce. Mason, as a representative of the company, engaged in the production and sales of products, was clearly engaged in interstate commerce. Therefore, her employment was covered by the FLSA.

The FLSA exempts from the requirement that the employer pay overtime premium pay "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. . .)." 29 U.S.C. § 213(a)(1). In the case of employers claiming the executive, administrative, or professional exemption, both

the United States Supreme Court and the Montana Supreme Court place the burden of keeping records and of proving the exemption defense upon the employer. *Arnold v. Ben Kanowsky, Inc.* (1960), 361 U.S. 388, 392; *Idaho Sheet Metal Works, Inc., v. Wirtz* (1966), 383 U.S. 190, 260; *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P. 2d 1222.

Under the FLSA, 29 U.S.C. §541.1, a bona fide executive, administrator or professional must meet all of the following guidelines.

1. The primary duty must be the management of the enterprise or of a customarily recognized department or subdivision; and

2. Must customarily and regularly direct the work of 2 or more employees; and

3. Has the authority to hire or fire employees, or whose suggestions or recommendations for the change of status of an employee is given particular weight; and

4. Who customarily and regularly exercises discretionary powers; and

5. Who does not devote more than 20%, or in the case of an employee of a retail service establishment, who does not devote as much as 40% of their hours of work within a week to activities not directly related to the performance of duties referred to in 1 through 5 above: and

6. Who is compensated for their services on a salary basis at a rate of not less than $455.00 per week.

To qualify for the exemption, the employer must show that Mason was paid at least $455.00 per week. The facts show that the employer paid Mason a salary of $326.05 per week, or less than $455.00 per week. Therefore, the employer does not qualify for the exemption.

C. Liquidated Damages.

Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. §39-3-408. The FLSA has a liquidated damages provision which states:

> Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages. The employer has consistently maintained that Mason was an exempt employee and has proceeded under that concept since October 4, 2004. Prior to August 23, 2004, the FLSA required that an exempt employee be paid only $250.00 per week. 29 U.S.C. § 216

However, the Portal to Portal Act alters the liquidated damages provision of the FLSA.

> In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.29 U.S.C. § 260.

The court may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith. To demonstrate "good faith" under this exception, an employer must show "the act or omission giving rise to [the violation] was in good faith and that [they] had reasonable ground for believing that [their] act or omission was not a violation of the [FLSA]." *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir.,1987). This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.*

In this case, the respondent had an honest subjective (though erroneous) belief (as evidenced by the consistent testimony of the respondent) that the claimant was an exempt employee and therefore not entitled to overtime compensation. The respondent's honest intention was to move the claimant into a management position and make the claimant an exempt employee. Furthermore, had the respondent believed that the claimant was a non-exempt employee, respondent would have undoubtedly paid her overtime in accordance with FLSA requirements as it did when the claimant was an hourly employee. The parties have presented no evidence to show that the respondent has ever engaged in or even been accused of failing to

comport with FLSA requirements outside of this case. The respondent's conduct in this case was not an attempt to circumvent the FLSA requirements. Under the circumstances of this case, the respondent has met its burden and the imposition of liquidated damages is not appropriate.

The change to the requirement that an employer pay an exempt employee at least $455.00 per week took effect only 6 weeks prior to the employer's change of Mason's wages to salary. As a result, there is no evidence to show that the employer's actions were not in good faith.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this case. Mont. Code Ann. § 39-3-201 ***et seq.***; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Mason, as a representative of the company, was engaged in the production and sales of products, and was clearly engaged in interstate commerce. Her employment was covered by the FLSA.

3. The employer is not qualified to use the executive, administrator or professional exemption for Mason's employment.

4. There is no evidence to indicate that the employer's actions were not made in good faith. The employer does not owe Mason a liquidated damages award.

5. Mason worked at least 10 hours of overtime per week during the 20 week period beginning October 4, 2004 and ending February 20, 2005, yielding a premium pay of $122.30 per week for 20 weeks, or $2,446.00.

VI. ORDER

Zachary Dugdale, BZB Enterprises, d/b/a Wendy's is hereby ORDERED to tender a cashier's check or money order in the amount of $2,446.00, representing that amount in premium overtime wages, made payable to Heather Mason, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 9th day of September, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
David H. Frazier
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

Mason FOF dfp